No. 15446 (In Admiralty)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. Muna, deceased, *et al.*,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

Appeal From the United States District Court for the Southern District of California, Central Division.
Hon. Thurmond Clarke, Judge.

Brief of Respondent Douglas Aircraft Corporation, Inc.

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Preliminary Matter.

In this brief Respondent Douglas Aircraft Corporation, Inc., will sometimes be referred to as "Douglas," Respondent Transocean Air Lines, Inc., will sometimes be referred to as "Transocean" and Respondent Slick Airways, Inc., will sometimes be referred to as "Slick."

In this brief the record will be referred to in the same manner utilized by Appellants and explained in the footnote on page 2 of Appellants' Opening Brief.

Jurisdictional Statement.

Respondent Douglas accepts the Jurisdictional Statement set forth on pages 1-3 of Appellants' Opening Brief.

Statement of Case.

Respondent Douglas accepts the Statement of the Case as set forth on pages 3-6 of Appellants' Opening Brief.

Questions Presented.

The questions presented herein and hereby are as follows:

1. Do Appellants seek reversal of the judgment insofar as the judgment is in favor of Douglas?
2. Does the express theory upon which the case was tried as against Douglas (to-wit, that *res ipsa loquitur* does not apply against Douglas) prevent consideration of the doctrine of *res ipsa loquitur* as possibly applicable against Douglas on this appeal?
3. Does Finding of Fact No. XXXIV which is not specified or assigned as, or claimed to be, erroneous, entitle Douglas to affirmance of a judgment in its favor?

Summary of Argument.

The argument hereinafter set forth will be devoted: Under Point I to showing that appellants' Opening Brief does not seek reversal of the judgment insofar as the judgment is in favor of Douglas; under Point II to showing that under the theory of Appellants and of Douglas at the trial the doctrine of *res ipsa loquitur* cannot be considered as even possibly applicable as against Douglas on this appeal, and, under Point III to showing that Douglas has been found by the trial court to have been guiltless of negligence, that such finding has not been specified or assigned as erroneous and that no evidence in conflict with such finding has been indicated by Appellants.

ARGUMENT.

I.

Appellants Do Not Seek and Do Not Attempt to Show Grounds for a Reversal of the Judgment Insofar as the Judgment Is in Favor of Douglas.

A careful study of Appellants' Opening Brief establishes that Appellants do not seek, have not requested, and have not argued for a reversal of the judgment insofar as Douglas is concerned.

The following excerpts from Appellants' Opening Brief are of significance upon this subject:

> "While Douglas is a Respondent herein, it has been joined *only* so that the court can have all parties before it." (App. Op. Br. p. 3.) (Emphasis added.)

> "CONCLUSION

> "For the foregoing reasons, the judgment in favor of Respondents *Transocean* and *Slick* should be reversed." (App. Op. Br. p. 53.) (Emphasis added.)

An analysis of the arguments presented in Appellants' Opening Brief shows that there is no contention made by Appellants that the judgment in favor of Douglas is erroneous.

On page 6 of Appellants' Opening Brief under the heading "Questions Presented," Appellants state (p. 6):

> "The basic issue involved in this appeal is whether the doctrine of *res ipsa loquitur* applies against an air carrier and maintenance firm, or either, sued in admiralty for the death of a passenger in an airplane crash on the high seas."

Since Appellants have earlier in their brief pointed out that the "carrier" involved is Transocean (App. Op. Br. pp. 1, 4], that the "maintenance firm" is Slick (App. Op.

Br. pp. 1, 5) and that Douglas is a "manufacturer" (App. Op. Br. pp. 1, 2, 4, 18), it is clear that Appellants do not attempt to involve Douglas in the "basic issue," which concerns possible application of the doctrine of *res ipsa loquitur* as against Transocean and Slick. (We shall show under Point II hereinafter that the doctrine of *res ipsa loquitur* cannot be considered as even possibly applicable against Douglas on this appeal.)

Point I.A. of Appellants' Opening Brief (pp. 11-16) is limited to an argument that the doctrine of *res ipsa loquitur* should have been applied as against Transocean.

Point I.B. of Appellants' Opening Brief (pp. 16-22) is limited to an argument that the doctrine of *res ipsa loquitur* should have been applied as against Slick.

Point I.C. of Appellants' Opening Brief (pp. 22-25) is an argument to the effect that the doctrine of *res ipsa loquitur* is not made inapplicable merely because an action is tried in admiralty under the Death on the High Seas Act.

Point II of Appellants' Opening Brief (pp. 25-31) is limited to an argument that if the court did in fact apply the doctrine of *res ipsa loquitur* it erred in failing to award judgment to Appellants. (As we shall show under Point II of this brief, Appellants specifically represented to the trial court and to Douglas at the outset of the trial that Appellants did not claim that the doctrine of *res ipsa loquitur* had any application as against Douglas [R. 9] and no contrary view could be taken on this appeal.)

Point III.A. of Appellants' Opening Brief (p. 32) is simply an argument that upon an appeal in an admiralty case the court is authorized to reweigh the evidence.

Point III.B. of Appellants' Opening Brief (pp. 33-46) is, specifically, an argument that Appellants were entitled to judgment against Transocean.

Point III.C. of Appellants' Opening Brief (pp. 46-49) is, specifically, an argument that Appellants were entitled to judgment against Slick.

Point IV of Appellants' Opening Brief (pp. 50-52) quotes the findings which Appellants specified were erroneously made (and it is of significance that none of such assigned findings refers to Douglas or bears upon or touches any conduct of Douglas). (It is especially noteworthy that Finding of Fact No. XXXIV [V. 1, R. 49] wherein the trial court found that Douglas was guiltless of negligence is not among the findings so quoted, assigned or specified by Appellants.)

Point V of Appellants' Opening Brief (pp. 52-53) is simply an argument that Appellants were entitled to recover the value of certain personal property from Transocean, by virtue of decedents' contract with Transocean.

From the foregoing it is clear that Appellants do not seek, and do not attempt to show grounds for, a reversal insofar as the judgment is in favor of Douglas.

II.

The Express Theory Upon Which the Case Was Tried by Appellants Against Douglas Prevents Consideration of Any Possible Application of the Doctrine of Res Ipsa Loquitur as Against Douglas on This Appeal.

At the outset of the trial, and prior to the taking of any evidence, counsel for Appellants stated in open court that the doctrine of *res ipsa loquitur* neither could or should apply as against Respondent Douglas [R. 9].

It is thus clear that Appellants and Respondent Douglas tried, and the court decided the case upon the theory that the doctrine of *res ipsa loquitur* was inapplicable against Douglas.

We have shown under Point I of this brief that Appellants have not, in their Opening Brief, attempted to depart from the theory upon which the case was tried as against Douglas. In any event because of the theory upon which the case was tried, no consideration can be given to any idea that the doctrine of *res ipsa loquitur* might be considered applicable as against Douglas.

Said the court in *Raiche v. Standard Oil Co.,* 137 F. 2d 446 at 449:

> "Having elected to try her case in the trial court on the theory that the burden of proof was upon her, she can not on appeal seek reversal on a different or inconsistent theory. Loomis, Collector, v. Wattles, 8 Cir., 266 F. 876; Hatcher v. Northwestern Nat. Ins. Co., 8 Cir., 184 F. 23."

In accord:

> *Lambor v. Yates,* 148 F. 2d 137, 138, and cases cited therein.

III.

There Being No Contention, Argument or Specification That Finding of Fact No. XXXIV Was Erroneous, or Induced by Error, or Was Unsupported by the Evidence or Contrary to It, the Judgment in Favor of Douglas Should Be Affirmed.

There has never been allegation or contention in this case that the airplane, manufactured by Douglas, was defective in design, engineering or manufacture. In fact, it was stipulated, as Appellants say at page 18 of their Opening Brief, that the Douglas DC-6A aircraft was designed, engineered and manufactured as a fail-safe airplane, and that it is in current use by many of the larger scheduled airlines throughout the world with generally satisfactory operating results.

The complaint (or libel) alleges that Douglas in about April and May, 1953, had possession of the airplane for the purpose of accomplishing thereon certain modifications and alterations, including inspections thereof [V. 1, R. 3-4]. Such allegation was not and is not denied. It is then charged in the complaint: "Said crash was proximately caused by the negligent and careless manner in which defendant Douglas Aircraft Company, Inc., accomplished, if at all, said modifications and alterations [V. 1, R. 4]. Such charge was and is denied [V. 1, R. 15a].

At the trial Appellants did nothing toward establishing such charge of negligence and the record is void of such evidence. Nor do Appellants in their Opening Brief hint or suggest that there was any evidence of any negligence on the part of Douglas. But even if there *had* been testimony on the subject, which there was not, the trial court would not have been bound thereby and its finding would

still have been efficacious. (*Michner v. Hutton,* 203 Cal. 604, 265 Pac. 238; *Quock Ting v. United States,* 140 U. S. 417, 420, 35 L. Ed. 501, 11 S. Ct. Rep. 733, 734.)

The trial court found:

"XXXIV.

"Douglas was not negligent in the modifications and alterations, or otherwise of N 90806." [V. 1, R. 49.]

Such unattacked finding of the trial court, standing alone, establishes that Appellants' allegation of negligence as against Douglas was untrue. And particularly is that true since the record does not contain and Appellants have not pointed out any testimony or any evidence of any negligence on the part of Douglas.

Conclusion.

It is urged that the judgment in favor of Douglas and against Appellants be affirmed.

Respectfully submitted,

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Attorney for Respondent Douglas Aircraft Corporation, Inc.